

To (Migration) [2018] AATA 4545 (13 September 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Kuen To
CASE NUMBER:	1728200
DIBP REFERENCE(S):	BCC2015/3301457
MEMBER:	Simone Burford
DATE:	13 September 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 13 September 2018 at 4:32pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – evidence of the relationship – limited information about living arrangements – shared expenses for transport payments – third party statements in support of the relationship – shared house living – current information not provided – decision under review affirmed

PRACTICE AND PROCEDURE – declined hearing offer – additional information not provided

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65, 360

Migration Regulations 1994 (Cth), Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 3 November 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 10 November 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the evidence provided was not sufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor as defined under s.5F and s.5CB of the Act.
4. The applicant was represented in relation to the review by her registered migration agent.
5. On 23 July 2018 the applicant was invited to attend a hearing before the Tribunal to be held on 5 September 2018 to give evidence and present argument. On this 28 August 2018 the applicant's registered migration agent responded to the hearing invitation indicating that the applicant and sponsor were not attending the hearing. The Tribunal sought to clarify with the representative if the applicant was withdrawing the application or consenting to the application being decided without a hearing. In response, the applicant's representative confirmed that the applicant consented to the Tribunal deciding the review without the applicant appearing before it.
6. The Tribunal is satisfied that the applicant was provided with an invitation to attend a hearing before the Tribunal to give evidence and present argument. The Tribunal is satisfied that the applicant has chosen instead to consent to the Tribunal deciding the review without appearing before it and the Tribunal has proceeded to a decision on the basis: s.360(2)(b). This matter has therefore been determined on the evidence available to the Tribunal.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse or de facto partner of the sponsor.
9. The Tribunal notes that from the information on the file and the account of the applicant's visa history contained in the decision record that the applicant's last substantive visa ceased on 30 August 2011. As the partner visa application was not lodged until 10 November 2015 the issue of the waiver of the criteria of Schedule 3 of the Migration Regulations may also arise the applicant's case.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties provided a copy of a ceremonial marriage certificate from marriage conducted on 19 October 2014 in Western Australia between the applicant and the sponsor. The tribunal notes that an official marriage certificate was not provided. However as the delegate proceeded on the basis that the parties were validly married the Tribunal has proceeded on that basis. The Tribunal finds on the evidence available, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

13. The Tribunal has before it the delegate's decision which was provided to the Tribunal by the applicant with the application for review. The Tribunal also has the Department's file relating to the applicant. The Tribunal notes that the applicant did not submit any additional material or information to the Tribunal.
14. The applicant was also invited by the Tribunal to put forward any claims she would like the Tribunal to consider in deciding whether Schedule 3 criteria should be waived in her case. No information or submissions were made in relation to the waiver of the Schedule 3 criteria.
15. The following relevant documents were included in the Department's file:
 - an Australian Super statement dated 3 August 2015 for the sponsor noting a change in the nominated beneficiaries, nominating the applicant as a non-binding beneficiary
 - an Australian Super profile report dated 8 August 2017 noting the sponsor's home address in Melville Western Australia and noting the applicant is a non-binding nominated beneficiary
 - a ceremonial Certificate of Marriage dated 19 October 2014
 - photographs of the applicant and sponsor together and with others
 - photographs of several rooms in a home and photographs of a yard

- two screenshots of the text messages - between 'Joey' [[the applicant] and another unidentified person. It appears from the doctor's statement that the applicant is also known as 'Joey'. On this basis the Tribunal assumes that the 'Joey' referred to in the text messages is the applicant. The Tribunal has also assumed from the context in which the texts were submitted that the unidentified person in the exchange is the sponsor. However, the Tribunal was unable to confirm this from the file.
- a Form 888 statutory declaration from Philip Ian Benjamin dated 22 October 2015
- a Form 888 statutory declaration from Cathcart David John Wesley dated 11 August 2015
- a Form 888 statutory declaration from Yat Heung Lau dated 22 October 2015
- three payslips in the name of the sponsor at an address in Success, Western Australia dated 17 February 2016, 2 March 2016 and 15 March 2016
- BankWest statements for what appears to be a joint account in the applicant and sponsor's name to an address in Melville, Western Australia for the periods 22 July 2015 to 21 September 2015 and 21 January 2017 to 21 February 2017
- BankWest Debit MasterCards bearing the name of the applicant and sponsor
- medical records related to the sponsor including a letter from Dr David Nelson regarding the sponsor dated 20 October 2015 and records from St John of God Murdoch Hospital from January 2015, Fremantle Hospital from 25 November 2011 and Gerald Burns pharmacy from January 2010 to October 2015.

16. In addition the Department's file also included submissions from the applicant's registered migration agent concerning Schedule 3 criteria and evidence of partner relationship. The submissions state as follows:

17. our client has instructed us in response to the request [for information] and have provided the following submissions on why there are compelling reasons that the schedule three criteria should be waived.

18. The sponsor's doctor Dr David Nelson has provided an opinion This states 'Kevin has epilepsy to which he is very vulnerable. He has developed a relationship with Joey who is prepared to be his Partner and care for him.

19. Given that each of his admissions to hospital cost the taxpayer significantly, I would supporter application for a visa.'

20. In addition, evidence of his medications has been provided by his local pharmacy. Details of some of his previous hospital admissions including conference if hospital records, clinical notes and medical reports have also been uploaded...

21. It is their submission to his severe medical condition is a sufficiently compelling reason to allow the delegate to engage the waiver of schedule three criteria.

22. The Tribunal has considered the information available on the Department's file and the submissions made to the Department in reaching its decision.

23.

24. *Relationship background*

25. The applicant, Kuen To is a 49 year old Chinese national. According to the delegate's decision she entered Australia in on 25 July 2006 of the holder of an electronic travel authority. In 21 September 2006 she was granted a student visa. She was granted a student series of student visas the last of which ceased on 30 August 2011. On 30 August 2011 she lodged a student visa which was refused on 22 June 2012. This refusal was reviewed and affirmed on 10 October 2013. A request in ministerial intervention was refused on 14 May 2014. A divorce order under the Family Law Act 1975 dated 11 March 2010, which was included on the Department's file, indicated that the applicant was previously married from March 1992 to February 2010. There were no children of the relationship. The sponsor, Kevin David Odgers, is a 58 year old Australian citizen. According to the application, the sponsor has not been previously married.
26. The visa application indicates that the parties' met on 1 May 2014 and entered into a committed relationship on 1 July 2014. They were married on 19 October 2014. There are several photographs on the Department's file which appear to be photographs from the wedding. These include people in addition to the applicant and sponsor. None of those photographed are identified.
27. In forming an opinion whether the requirements for a spousal relationship are met the Tribunal has had regard to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3).

28. *Financial Aspects*

29. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of real estate or other major assets and joint liabilities, the extent of pooling of financial resources especially in relation to major financial commitments, any legal obligations owed by the other party, and any sharing of the day-to-day household expenses.
30. The applicant states in the application for the visa that *'they share all financial aspects of the relationship'*.
31. The parties provided BankWest statements for what appears to be a joint account in the applicant and sponsor's name to an address in Melville, Western Australia for the periods 22 July 2015 to 21 September 2015 and 21 January 2017 to 21 February 2017. They also provided a photograph of this BankWest Debit MasterCard bearing the name of the applicant and sponsor.
32. The BankWest statements for the period 21 January 2017 to 21 February 2017 show transactions totalling hundred and \$155 in debits and \$150 in credits. The transactions appear to predominantly relate to the charges and taxi charges and several other small purchases. The statement for the period 21 July 2015 to 21 September 2015 includes one of two pages. The page provided, which covers 22 July 2015 to 18 September 2015, includes credits to the value of \$1100. It includes purchases at Woolworth's, Coles and Priceline.
33. In addition, the parties provided two documents in relation to the sponsor's superannuation account. This provides evidence that the applicant's was made a non-binding beneficiary of the sponsor's superannuation account on or around August 2015 and was still listed as a non-binding beneficiary in August 2017. The Tribunal gives these statements some weight as evidence of commitment. However, the Tribunal notes that such a nomination is non-binding and can be changed relatively easily and as such is of limited value on its own as

evidence of either combining of financial resources or of financial commitment in the longer term. No evidence of the parties' current financial arrangements has been provided.

34. The parties have provided very little documentary evidence in relation to their financial circumstances and chose not to provide oral testimony. The evidence that is available is for two very short periods one in 2015 and one in 2017. While the transactions in relation to the brief period of the statement in 2015 are consistent with household grocery purchases little more can be determined from the statement. The statement in 2017 has noticeably different transactions which appear to be limited to predominantly transport related transactions. It is not possible for the Tribunal to find on the information provided that this account is genuinely being used by the parties as a means of combining their day-to-day expenses or of pooling their financial resources. Given the limited nature of the documents the Tribunal has given them limited weight as evidence of sharing of day stay living expenses or of pooling of financial resources.
35. The Tribunal notes that this issue was raised in the delegate's decision and that no further information was provided by the parties to the Tribunal to support their claim that they share for financial aspects of the relationship.
36. On the basis of the evidence available the Tribunal is unable to find that the parties' financial arrangements are such that would indicate a genuine married relationship at the time of application and the time of decision.

37. *Nature of the household*

38. The Tribunal has had regard to the evidence as to the nature of the household including any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of the responsibility of housework.
39. This applicant states in the application for the visa that the parties '*share the household chores....And any domestic duties*'.
40. The Tribunal notes that on the information provided it appears that the parties do not have any children together.
41. The application states that the applicant and sponsor live at an address in Melville, Western Australia. The application does not indicate how long the applicant and sponsor have lived at this address. However, the Tribunal notes that the only document on the file addressed to the applicant at this address are the BankWest statements. Documents on the file addressed to the sponsor indicate a range of addresses including an address in Success, Western Australia on his payslips from February and March 2016 and on medical records from January 2015. A further address in Attadale Western Australia is listed on one of his medical records from May 2013.
42. The Form 888 statutory declarations of Ms Yat Heung Lau and Mr Phillip Ian Benjamin states that the applicant and sponsor live with them in their home in Melville, Western Australia. The statements indicate that the applicant has lived with them since moving from Sydney in mid-2014. They also indicate that the sponsor has lived with them in their home since the applicant and sponsor married in October 2014. The Form 888 statutory declarations do not make a comment on the nature of the household and neither Miss Lau nor Mr Benjamin gave evidence before the Tribunal. However, the Tribunal gives their statements some weight as evidence that the applicant and sponsor both live at the Melville address and that they met and married in 2014.

43. The Tribunal notes that the delegate's decision raised a concern regarding contradictions in the addresses provided for the sponsor on the information provided to the Department by the applicant. No further material was provided to the Tribunal in support of the parties' claim to share a household and no current information on the parties living arrangements was provided.
44. The Tribunal notes that there is very limited evidence available from the parties in relation to their living arrangements. Further there is contradictory material in relation to addresses for the sponsor. While the Tribunal places some weight on the Form 888 statutory declarations of the applicant and sponsor's friends Ms Lau and Mr Benjamin, in the absence of any other evidence to corroborate the claim that the applicant and sponsor are living together in a genuine married relationship and the Tribunal is unable to find on the evidence that the nature of the parties' household is such that would indicate a genuine married relationship at the time of application and the time of decision.

45. *Social aspects of the relationship*

46. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being married to each other, the opinion of the parties' friends and acquaintances about the nature of the relationship, and any basis on which the parties plan to undertake joint social activities.
47. There was no evidence on the file from either of the parties' families in relation to the relationship.
48. The parties have provided supporting material including photographs in group settings and several Form 888 statutory declarations. The Tribunal notes that the Form 888 statutory declarations of Ms Lau, Mr Benjamin and Mr Weatherly provide third-party support for the relationship. All three statements note that the parties met in May 2014 and married in October 2014. As noted above, Ms Lau and Mr Benjamin stated, in October 2015, that they live with the applicant and sponsor. They note that the couple are in a close relationship and state the parties' belief that they will continue in a long-term relationship. Mr Benjamin also states that the applicant has supported the sponsor in dealing with his epilepsy.
49. The parties also provide a letter from Dr Nelson, the sponsor's treating physician. Dr Nelson's letter notes '*Kevin has epilepsy to which he is very vulnerable. He has developed a relationship with Joey who is prepared to be his partner and care for him*'.
50. The Tribunal gives weight to the third party statements supporting the relationship as evidence of social recognition consistent with a married relationship. However, in the absence of further evidence corroborating the relationship and the absence of testimony from the parties, the Tribunal is unable to find that the parties represent themselves as being in a married relationship or undertake social activities in a manner consistent with a genuine married relationship at the time of application and the time of decision.

51. *Nature of commitment*

52. The Tribunal had regard to evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
53. The Tribunal notes that the evidence suggests that the parties met in May 2014 and married in October 2014. This means that at the time of the decision the parties have known each other for over four years and been married for just under four years. While the Form 888

statutory declarations mentioned above provide support for the relationship, their belief that the relationship was long term and the support provided by the applicant to the sponsor particular in relation to his health condition, the Tribunal has no evidence from the parties as to their commitment to each other.

54. In particular, the Tribunal notes that it has no evidence before it regarding the status of the relationship since the Form 888 statutory declarations were made in August and October 2015. The Tribunal notes that the applicant and sponsor chose not to attend a hearing to provide evidence or make submissions. As such the Tribunal has no current evidence as to the status of the relationship and is unable to find that the relationship is genuine and continuing. The Tribunal is also unable to find that there is a mutual commitment by the parties to the relationship.
55. *Any other relevant factors*
56. The Tribunal notes that the parties chose not to attend the hearing or to provide any additional information, evidence or submissions to the Tribunal in support of the application for review. The Tribunal respects the right of the applicant to choose not to attend the hearing and to opt instead to consent to the matter being decided without a hearing. However, the lack of evidence provided and the parties' lack of engagement with the process is such that it leads the Tribunal to question the nature of the parties' commitment to each other. In particular, it leaves the Tribunal unable to be satisfied that the parties are in a genuine and continuing relationship at the time of decision.
57. Based on the evidence before it the Tribunal is not satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is not satisfied on the evidence that the parties are not in a genuine and continuing relationship at the time of application and at the time of decision. Further the Tribunal is not satisfied on the evidence that the applicant and sponsor live together or not separately and apart on a permanent basis at the time of application and at the time of decision.
58. Having regard to the totality of the evidence before it, the Tribunal is not satisfied that at the time of the application and time of the decision the visa applicant and sponsor meet the requirements of s.5F(2) for a married relationship.
59. Therefore, the applicant does not meet cl.820.211(2)(a). The applicant also fails to meet these requirements at the time of decision. She therefore meets cl.820.221(1).
60. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
61. There is no information before the Tribunal that the applicant has been or is the holder of a subclass 300 (Prospective Marriage) visa and no suggestion that the alternative criteria in cl.820.211(5), cl.820.211(6), cl.820.211(7), cl.820.211(8) and cl.820.211(9) apply in the applicant's circumstances.
62. No claim of relevant family violence has been made and there is no evidence that the sponsoring partner has died. There is no evidence that there are any children of the relationship or that the parties have any joint responsibilities in relation to children. Therefore, there is no evidence before the Tribunal that the applicant meets any of the alternative sub criteria in cl.820.221(2) and 820.221(3).
63. Therefore the applicant does not meet cl.820.221.

64. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
65. The Tribunal notes that in light of the findings above it is not necessary for the Tribunal to consider the issue of the waiver of the Schedule 3 criteria.

DECISION

66. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).